No. 12879.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES MONROE JEFFERSON,

Appellant,

vs.

STOCKHOLDERS PUBLISHING CO., INC., a Nevada corporation,

Appellee.

APPELLEE'S REPLY BRIEF.

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A.

Statement of the Pleadings and Facts Disclosing Jurisdiction.

Appellant is a resident of the State of California and Appellee is a Nevada corporation. The matter in controversy is based on an action for damages for alleged libel wherein a sum in excess of $3,000 is sought [R. p. 3]. The United States District Court is alleged to have jurisdiction because of the diversity of citizenship and because of the amount in controversy as provided in 28 U. S. C. 1332. A final Order of Dismissal was entered [R. pp. 14-16] and this Court has jurisdiction of an appeal therefrom as provided in 28 U. S. C. 1291.

B.

Statement of the Case.

Appellant filed an action for damages for libel against the Appellee, alleged to have been suffered by reason of an article published in the "DAILY NEWS," a newspaper owned and published by Appellee [R. pp. 3-9]. The complaint was filed January 12, 1950 [R. p. 19]. The summons was not issued until August 22, 1950, over seven (7) months later [R. p. 19]. Thereafter Summons was served and filed with the Clerk on August 30, 1950 [R. p. 12].

An Amended Motion to Dismiss (the action) was filed by Appellee on September 28, 1950, under Rule 41b and Rule 12b, Clauses 2 and 4, of the Federal Rules of Civil Procedure [R. p. 13]. After consideration of Points and Authorities submitted by the parties and after oral argument, the Trial Court granted the Motion and ordered the action dismissed on January 15, 1951 [R. pp. 14-16].

Rule 41b provides as follows:

> "(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff . . . to comply with these rules . . . a defendant may move for dismissal of an action or of any claim against him . . ."

Rule 12b, Clauses 2 and 4 provide as follows:

> "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . .
>
> (2) Lack of jurisdiction over the person . . .

(4) Insufficiency of process . . .
. . . No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion . . ."

The Order of Dismissal recites two grounds therefor, to-wit:

"I.

That plaintiff failed to comply with Rule 4a of the Federal Rules of Civil Procedure, in that the complaint was filed on the 12th day of January, 1950, and the summons was not issued until the 22nd day of August, 1950, over seven (7) months later, and therefore, said action should be dismissed under Rule 41b of Federal Rules of Civil Procedure, and

II.

That plaintiff having failed to comply with Rule 4a of the Federal Rules of Civil Procedure as aforesaid, this Court, therefore, has no jurisdiction over the defendant."

There are only two questions presented by this Appeal, to-wit:

1. Did the court abuse its discretion in granting Appellee's Motion to Dismiss on the ground that Appellant failed to comply with the Federal Rules of Civil Procedure;

2. Did the court err in ruling that it has no jurisdiction under the above statement of facts, over the Appellee.

If the Court determines that either of the foregoing questions should be answered in the negative, the Order of Dismissal must be affirmed.

C.
ARGUMENT.

Summary.

The record here clearly shows that Appellant did not comply with the provisions of Rule 4a of the Federal Rules of Civil Procedure. In such circumstances the Court may, in the exercise of its discretion, dismiss the action.

The United States Supreme Court promulgated the Federal Rules of Civil Procedure. These Rules may not be superseded by State Rules of Civil Procedure in United States District Courts.

The United States District Court had no jurisdiction over the Appellee for the reason that the action was not commenced in accordance with the requirements of Rules 3 and 4a of the Federal Rules of Civil Procedure, in that the Summons was not issued until over seven months after the date of the filing of the complaint.

Appellee by appearing by a Motion to Dismiss, which Motion attacks the jurisdiction of the Court, does not, by such appearance, confer jurisdiction upon the Court, the distinction between general and special appearances having been abolished.

I.

The Court Did Not Abuse Its Discretion in Dismissing the Action Under Rule 41b of the Federal Rules of Civil Procedure.

The Summons was not issued in accordance with the provisions of Rule 4a, Federal Rules of Civil Procedure, and, therefore, it was proper for the Court to dismiss the action under Rule 41b, Federal Rules of Civil Procedure. Rule 4a provides:

> "Upon the filing of the complaint the Clerk *shall forthwith* issue a summons and deliver it for service to the marshal or to a person specifically appointed to serve it . . ." (Emphasis supplied.)

Rule 41b, Federal Rules of Civil Procedure (*supra*), provides that the Court, in its discretion, may dismiss an action for failure to comply with the Rules.

In the case at bar no summons was issued until over seven months after the complaint was filed. Appellant now attempts to excuse himself for his failure to comply with the requirements of Rule 4a on the ground that he was required to file an Undertaking under the provisions of the California law. The pertinent provisions of the California law to which Appellant has reference is found in Section 4317, General Laws of California, page 1532. Section 1 provides:

> "1. Undertaking. In an action for libel or slander the clerk shall, *before issuing the summons therein,* require a written undertaking on the part of the plaintiff in the sum of five hundred (500) dollars, with at least two competent and sufficient sureties, specifying their occupations and residences, to the effect that if the action be dismissed or the defendant

recover judgment, that they will pay such costs and charges as may be awarded against the plaintiff by judgment or in the progress of the action or on an appeal, not exceeding the sum specified in the undertaking. An action brought without filing the undertaking required shall be dismissed." (Emphasis supplied.)

It is to be noted that the provisions of the California law requiring an Undertaking in a libel action provide that the Clerk of the Court must require an Undertaking *"before issuing the Summons."*

It is also to be noted that a plaintiff in a libel action (whether in the State Court or the Federal Court) does not have *one year* within which time to file an Undertaking as suggested by Appellant (App. Op. Br. pp. 7, 8, 9). *Per contra,* the Undertaking must be filed *before issuing the summons.*

Appellant argues (App. Op. Br. pp. 7, 8) that since he was required to file an Undertaking under the provisions of the California law (clearly a Statute involving *substantive* law) that the United States District Court should, thenceforth, be governed not by the Federal Rules of Civil Procedure but by the California Code of Civil Procedure, Section 406, which permits plaintiff to request issuance of a Summons any time within one year from the date of the filing of the complaint.

Appellant's position obviously is fallacious. Appellant chose the United States District Court as his Forum. That Court requires that Summons be issued "forthwith" upon the filing of the complaint. The plaintiff in a libel action, therefore, must provide the Undertaking at the time of the filing of the complaint, to the end that the Clerk can issue the Summons "forthwith," thereby complying

with the provisions of Rule 4a. Plaintiff having thus chosen his Forum, it follows as of course, that he must abide by the *procedural* rules of such Forum.

See *Merchants Transfer Co. v. Regan,* 170 F. 2d 987 (1948), where the Court said at page 991:

> "It is quite well settled that the manner and method to be followed in commencing actions is procedural and is controlled by the laws of the forum in which the action is filed."

and at page 992:

> ". . . We held that the time within which the action must be brought or filed . . . was controlled by New Mexico law, *but that the manner in which it was brought or filed was procedural and in the Federal Court was controlled by its rules of procedure* . . ." (Emphasis supplied.)

See *Isaacks v. Jeffers,* 144 F. 2d 26 (1944), Cert. Den. 326 U. S. 781, 65 S. Ct. 270 (also cited by Appellant), where the Court stated at page 28:

> ". . . the *manner* in which actions are commenced, when actions are deemed to have begun, the manner and method of serving process all relate to *procedure* and *are governed by the law of the forum in which the action* is instituted . . ." (Emphasis supplied.)

See also *Yudin v. Carroll,* 57 Fed. Supp. 793 (1944), where the Court said at pages 798 and 799:

> ". . . Rule 3 provides that the first step in an action is the filing of a complaint. That step is to be followed *forthwith* by issuance of a summons and its delivery for service to the Marshal . . . The requirement of Rule 4a that the summons be delivered

for service to the Marshal serves a salutary purpose. Unless both provisions are read and considered together *substantive rights of persons may be seriously affected without their knowledge that a complaint has been filed* in the office of the clerk . . ." (Emphasis supplied.)

See also *Schram v. Holmes,* 4 F. R. D. 119 (1943). In this case the process service was made nine months after the complaint was filed (although the summons was issued forthwith) and six months after the Statute of Limitations had run. The Court held that there was a lack of diligence and the case was thereupon dismissed.

The Court said, at page 122:

"It is our conclusion that this court has the power to determine whether or not there has been due diligence used and we hold that in this particular action there was not. Nine months may not usually be of great importance in the life of a country or a world. On the other hand much can happen within that limited period. If the defendant had been served when he should have been served he might have made a settlement. It might have stopped interest running. He might have been in a position to offer a defense which he hasn't got now. Plaintiff knew for the greater part of six years that he was going to bring action against defendant some day if defendant didn't pay, but he held back almost the entire six years and then added six months more to the statute of limitations. In the meantime between the time of the filing the bill of complaint and serving of the summons, great events rocked the world. In fact, it was in this interim that the second world war was started. Not that this necessarily had any disastrous effect upon defendant, but it may serve as

> illustrative of one reason why due diligence should be required at all times in the service of process. There are rapid changes of events nowadays that affect almost every individual. Home Savings Bank v. Young, 295 Mich. 725, 295 N. W. 474."

In the case at bar the summons was not even *issued* until over seven months after the complaint was filed and process service was not made until approximately seven months after the Statute of Limitations had run.

The alleged libelous article was published in the Daily News under date of January 19, 1949 [R. p. 4], and the Complaint was filed in the United States District Court on January 12, 1950 [R. p. 19], one week prior to the bar of the Statute of Limitations.

Summons was not issued nor served until after August 22, 1950 [R. p. 19]; a period of more than seven months after the action had been barred by the California Statute of Limitations. The Statute of Limitations on libel actions in the State of California is one year (California Code of Civil Procedure, Subdivision 3 of Section 340).

Thus the record clearly shows that the Appellant negligently allowed over seven months to elapse beyond the Statute of Limitations before he even procured the issuance of the Summons. Thus there was no commencement of the action which would toll the Statute.

It is stated in Barron & Holtzoff Federal Practice and Procedure, Rules Edition, Vol. 1, at page 276, as follows:

> "The Commentators agree, however, that although the Statute of Limitations may be regarded as a substantive matter, the method by which an action is commenced so as to toll the Statute is a question of procedure which is governed by Rule 3. The Courts

> have almost universally adopted this view, stating that the filing of the complaint under Rule 3 commences the action within the meaning of Statutes of Limitations. *This statement is subject to the qualification that delay in three additional steps, issuance of summons, delay to an officer for service, and service of summons and complaint on defendant may nullify the effect of filing the complaint."* (Emphasis supplied.)

It is to be noted that the Appellant in the instant case, delayed in *all three* of the steps above noted, *i. e.,* he delayed over seven months in the issuance of the summons; he delayed over seven months in delivering the same to an officer for service; and there was a delay of over seven months in serving the summons and complaint on the defendant. The corporate defendant, publisher of a large metropolitan newspaper, could have been readily served at any time.

See also, 8 Brooklyn Law Review 188, at page 193, where it is stated:

> "It would seem, however, that the filing of the complaint conditionally suspends the running of the Statute of Limitations, provided *the summons is issued forthwith and served within a reasonable time thereafter."*

Appellant having failed for over seven months to procure the issuance of the summons, did not comply with the clear unequivocal requirements of Rule 4a of the Federal Rules of Civil Procedure and by failing to deliver the summons and complaint to the Marshal for service, and by failing to cause service of summons and complaint to be made upon the defendant for such period, he certainly did not proceed with diligence.

Appellant argues (App. Op. Br. pp. 6, 7), that the word "forthwith" should be given a broad meaning, stating that "no specific time requirement is fixed" (when the United States District Court Clerk shall issue a summons).

We respectfully submit that the word "forthwith" does fix a specific time.

Black's Law Dictionary, Third Edition, defines "forthwith" as follows:

> "As soon as, by reasonable exertion, confined to the object, a thing may be done. Thus, when a defendant is ordered to plead forthwith, he must plead within twenty-four hours . . ."

Webster's New Twentieth Century Dictionary Unabridged, defines "forthwith" as follows:

> "1. Immediately; without delay; directly.
>
> 2. In law, as soon as the thing required may reasonably be done, commonly within twenty-four hours."

In light of these definitions, and the commonly understood meaning of the word, we are unable to follow Appellant's argument that "no specific time requirement is fixed."

Appellant also argues (App. Op. Br. pp. 6, 7), that the Rule (Rule 4a) makes clear that there is no time limitation as such because the Rule further "provides that 'upon request of the plaintiff' separate or additional summons shall issue."

It is implicit in the very language used that such authority granted to the Clerk contemplates the original issuance *forthwith* of a summons. The language referred to by

Appellant obviously refers to an *additional* or *alias* summons. We respectfully submit that this language is complementary to the first sentence, and in fact, accentuates the mandatory provision therein contained, *i. e.,* that the Clerk shall issue the summons forthwith upon the filing of the complaint.

We submit that the Court could not do otherwise than dismiss the case at bar in the circumstances and in light of the facts disclosed by the record. For the Trial Court to set a precedent to the effect that a Summons may be issued, in direct conflict with the Federal Rules of Civil Procedure, over seven months after the filing of the complaint, would be a dangerous precedent, and would effectively break down and render a nullity the pertinent provisions of the Federal Rules of Civil Procedure.

Following Appellant's reasoning, a District Court of the United States would be required to be governed by the myriad State Laws of Civil Procedure when a State Statute with reference to *substantive* law was to be interpreted. The Federal Rules of Civil Procedure in these circumstances would have little or no meaning and in fact, to pursue Appellant's argument to its logical conclusion, there would be little or no necessity for Federal Rules of Civil Procedure and Rule 4a would be a nullity. Appellant would have the United States District Courts bound by State Procedural rules rather than the Federal Rules of Civil Procedure promulgated by the Supreme Court of the United States, solely by reason of the fact that a State Statute involving *substantive* rights was involved.

II.

The Court Has No Jurisdiction Over the Defendant for the Reason That the Summons Was Not Issued Pursuant to Rule 4a of the Federal Rules of Civil Procedure, and Thus There Has Been an Insufficiency of Process Under Said Rule and, Therefore, There Has Been No Commencement of the Action.

Rule 3 of the Federal Rules of Civil Procedure provides:

> "A civil action is commenced by the filing of a complaint with the Court."

As hereinabove quoted, Rule 4a of the Federal Rules of Civil Procedure provides that upon the filing of the Complaint the Clerk shall "forthwith" issue a summons. In commenting upon this phase of the matter, it is stated in *Isaacks v. Jeffers, supra,* at page 28:

> "We are of the opinion that since the adoption of the Federal Rules of Civil Procedure, we must now look to Rules 3 *and* 4 to determine *when the action is commenced.*" (Emphasis supplied.)

Historical Background to Present Rules 3 and 4a, Federal Rules of Civil Procedure:

In exploring the basic *reasons* for the present rules 3 and 4a, it is important to note that in hearings which were held before the House Judiciary Committee, when the present rules were being formulated, it was stated:

> "There are at least six different views in the various states as to what constitutes the commencement of an action. That means great confusion when you

> come into the Federal Court. Does the filing of the complaint commence the action or is it the issuance of the summons . . . or is it the actual service of it? . . . Therefore, to avoid this confusion, Rule 3 fixes the filing of the complaint as the point of time which constitutes the beginning of an action. Rule 4a provides for the *immediate automatic issuance* of the summons and its delivery by the Clerk to the Marshal for service. Thus the steps which in various states have been taken as the beginning of the action must follow in quick sequence." (Emphasis supplied.)

See Edgar B. Tolman, Hearings Before the House Judiciary Committee, March 1-4, 1938, page 73.

Another important point in examining the historical background leading up to the adoption of the present Federal Rules of Civil Procedure is that the Federal Courts, prior to the adoption of these Rules, usually required, not only the filing of a complaint, but also the issuance of summons and delivery of process to the Marshal for service as a prerequisite for full commencement of the suit.

See *Andis v. Schick Dry Shaver, Inc.*, 94 F. 2d 271 (1938), where the Court stated that an action is deemed commenced so far as the parties to it are concerned, from the time the process is issued, and delivered to the serving officer with a bona fide intent to be served.

See also, *Farmers Loan & Trust Co. v. Lake Street Elevated R. R. Co.*, 177 U. S. 51; 20 Supreme Court 564

(1900), where the Court stated at 20 Supreme Court, page 568:

> "As between the immediate parties in a proceeding . . . jurisdiction must be regarded as attaching when the bill is filed and process has issued and where . . . the process is subsequently duly served . . ."

In analyzing the foregoing excerpts from the cases decided prior to the adoption of Federal Rules of Civil Procedure and the legislative history preceding the adoption of the rules, it is clear that the draftsmen of the Rules intended to require that an action be commenced by the filing of a complaint and the issuance of the summons *forthwith* to obviate the former confusion which had existed.

III.

The Trial Court Did Not Abuse Its Discretion in Dismissing the Action.

A Trial Court is vested under the Federal Rules of Civil Procedure (41b) with the power to dismiss an action for various causes, including laches or lack of diligence on the part of the plaintiff in prosecuting the action; failure to comply with any Order of Court or failure to comply with the Federal Rules of Civil Procedure. This power is addressed to the sound discretion of the Trial Court, and the exercise of such discretion should not be disturbed except upon a clear showing of an abuse of such discretion. This principle is basic and well established.

See *Shotkin v. Westinghouse Electric and Manufacturing Co.,* 169 F. 2d 825 (1948), where the Court said at page 826:

> "A motion to dismiss for failure to prosecute diligently is addressed to the sound judicial discretion of the Court, and the action thereon will not be disturbed on appeal unless such discretion was abused . . ."

See also, *Sweeney v. Anderson,* 129 F. 2d 756 (1942), where the Court said, at page 758:

> ". . . Every Court has the inherent power in the exercise of a sound judicial discretion, to dismiss a cause for want of prosecution. The duty rests upon the plaintiff to use diligence and to expedite his case to a final determination. The decision of a Trial Court in dismissing a cause for lack of prosecution will not be disturbed on appeal unless it is made to appear that there has been a gross abuse of discretion."

It should be noted here that the Appellant does not complain that the Trial Court abused its discretion, Appellant contending, *per contra,* that the Court committed an error of law. We respectfully submit that the record shows that no error of law was committed. The record likewise shows that the Appellant flagrantly disregarded the Federal Rules of Civil Procedure. The Trial Court, in the exercise of its sound judicial discretion, dismissed the action under the provisions of 41b, *supra.* Certainly, as above stated, in the light of the foregoing facts, it would

have been a dangerous procedent for the Trial Court to set, by ruling, in effect, that the Rules of Civil Procedure of the State of California take precedence over the Federal Rules of Civil Procedure in the United States District Court.

IV.

Appellant Has Not Correctly Construed the So-called "Outcome of Litigation Rule" in Diversity of Citizenship Cases.

Appellant contends that inasmuch as this case is before the Federal Court solely by reason of the diversity of citizenship of the parties, that the Court should apply the rule laid down in *Guaranty Trust Company v. York,* 326 U. S. 99, 65 Sup. Ct. 1464, and *Regan v. Merchants Transfer Co.,* 337 U. S. 530, 69 Sup. Ct. 1233, to the effect that the outcome of litigation in the Federal Courts should be substantially the same so far as legal rules determine the outcome of litigation, as it would have been if tried in a State Court. These two cases both involved the application of a State Statute of Limitations, and hold that the Federal Court must apply the State Law with reference to the time and manner in which the Statute of Limitations is tolled under the State Law. Clearly, these cases are not analogous in any way to the case at bar wherein Appellant contends that a United States District Court must apply the *California Rules of Civil Procedure* in lieu of the *Federal Rules of Civil Procedure.*

V.

Under the Federal Rules of Civil Procedure, Jurisdiction of the Court Properly May Be Attacked by a Motion to Dismiss.

Appellant contends (App. Op. Br. p. 10) that Appellee by appearing by Motion to Dismiss, has made a "general appearance" and that, therefore, the Court has jurisdiction over Appellee. Appellant also suggests that the proper procedure would have been to appear by a "Motion to Quash the Summons or the Service."

Appellee appeared by a Motion to Dismiss [R. p. 13] under Rule 12b of the Federal Rules of Civil Procedure. Such appearance, when made for the purpose of attacking the Court's jurisdiction, does not constitute a "general appearance" which would confer jurisdiction upon the Court.

See *Orange Theatre Corp. v. Rayherstz Amusement Corp.*, 139 F. 2d 871 (1944) (certiorari denied by United States Supreme Court, 322 U. S. 740, 64 S. Ct. 1057), where it is stated, at page 874:

> "It necessarily follows that Rule 12 has abolished for the Federal Courts, the age-old distinctions between general and special appearances. A defendant need no longer appear specially to attack the Court's jurisdiction over him . . ."

Conclusions.

In Appellant's Specification of Errors (App. Op. Br. p. 5) Appellant specifies

> 1. "1. The Court erred in finding that the appellant failed to comply with Rule 4(a) of F. R. C. P. in the delay in the issuance of summons." and . . .
>
> "3. The court erred in determining that the action should be dismissed because of the failure to have summons issued at the time of the filing of the complaint."

The record shows that the Appellant did fail to comply with such rule, *i. e.,* the rule requires that a summons be issued "forthwith" and the summons in this case was not issued until over seven months after the filing of the complaint. There is no provision in Rule 4a that this time may be extended for *any* reason or cause, and *per contra,* the rule is *mandatory* in its requirements that the summons be issued forthwith.

The rule has solid historical background and is supported by sound reasons. Such rule can be enforced, by the exercise of the sound discretion of the Trial Court, only by the action taken by the Trial Court in the instant case.

2. Appellant's second specification of error is to the effect that the Court erred in refusing to apply the provisions of the California Rules of Civil Procedure which permits the Clerk to issue a summons within one year from the date of the filing of the complaint. Appellant

has made no showing that the Federal Court is required to follow the California Rules of Civil Procedure merely because the Federal Court recognizes a substantive statute of this State.

3. Appellant's fourth specification is to the effect that the Court erred in finding that it had no jurisdiction over the Appellee, it having been served with summons and having appeared in the action by its Motion to Dismiss.

We have clearly shown that a defendant may appear by Motion to Dismiss and attack the jurisdiction of the Court under the appropriate provisions of the Federal Rules of Civil Procedure, Section 12b, and that such appearance does not thereupon confer jurisdiction upon the Court.

It is respectfully submitted:

1. That the Court did not abuse its discretion by dismissing the within action by reason of the failure of Appellant to comply with the Federal Rules of Civil Procedure;

2. That no error of law was committed by the Court in finding that it had no jurisdiction over Appellee.

The Trial Court's Order of Dismissal should be affirmed.

Respectfully submitted,

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